Supreme Court, U.S.
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No.

In the Supreme Court of the United States

IRWIN MORTGAGE CORPORATION,
PETITIONER,

v.

JOHN ROBERT CULPEPPER, PATRICIA STARNES CULPEPPER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, AND BEATRICE N. HIERS, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

The Eleventh Circuit held that the question whether "yield spread premiums" paid by home mortgage lenders to mortgage brokers represent illegal kickbacks under Section 8 of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607, may be resolved on a class-wide basis. The court based this holding on its conclusion that the standard governing liability for illegal kickbacks—promulgated by the U.S. Department of Housing and Urban Development ("HUD")—can be satisfied without proof that the amount of the yield spread premium, in combination with any other fees paid to the broker, exceeded the market value of the goods or services actually provided by the broker in connection with the loan transaction. In response to the court of appeals' decision, HUD issued a clarification of the governing standard that expressly rejected the holding of the Eleventh Circuit. This petition raises two issues:

1. Whether this Court should grant the petition, vacate the judgment below and remand to the Eleventh Circuit to reconsider its decision in light of HUD's intervening clarification?

2. Whether the court of appeals erred in affirming class certification under Federal Rule of Civil Procedure 23(b)(3) because it erroneously interpreted the standard governing liability for the payment of yield spread premiums under Section 8 of RESPA?

PARTIES TO THE PROCEEDING

The petitioner is Irwin Mortgage Corporation, formerly known as Inland Mortgage Corporation. The respondents are John Robert Culpepper and Patricia Starnes Culpepper, on behalf of themselves and all others similarly situated, and Beatrice N. Hiers, individually and as a representative of a class of similarly situated persons.

CORPORATE DISCLOSURE

Irwin Mortgage Corporation is an Indiana corporation, and a wholly-owned subsidiary of IFC Mortgage Corporation. IFC Mortgage Corporation is a wholly-owned subsidiary of Irwin Financial Corporation, a public corporation.

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Irwin Mortgage Corporation ("Irwin") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 253 F.3d 1324. The opinion of the district court granting class certification (Pet. App. 16a-27a) is reported at 189 F.R.D. 668, and the subsequent order of the district court granting a stay pending appeal, 1999 WL 1135127 (Pet. App. 28a-36a) is unreported. The decision of the court of appeals on a prior appeal reversing a grant of summary judgment for Irwin (Pet. App. 37a-46a) is reported at 132 F.3d 692, and the subsequent clarification of that decision on denial of a petition for rehearing and suggestion of rehearing en banc (Pet. App. 47a-49a) is reported at 144 F.3d 717. The original decision of the district court granting Irwin summary judgment (Pet. App. 50a-62a) is reported at 953 F. Supp. 367.

JURISDICTION

The court of appeals entered its judgment on June 15, 2001. Irwin filed a petition for rehearing and suggestion of rehearing en banc, which the court of appeals denied on August 15, 2001 (Pet. App. 66a-67a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The full text of the following provisions appears at Pet. App. 68a-139a:

12 U.S.C. § 2607(a), (c).

12 U.S.C. § 2617(a), (b).

24 C.F.R. § 3500.4(a)(1)(ii).

24 C.F.R. § 3500.14(g)(1), (2).

Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to

Mortgage Brokers; Final Rule, 64 Fed. Reg. 10,080 (Mar. 1, 1999).

Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b); Final Rule, 66 Fed. Reg. 53,052 (Oct. 18, 2001).

STATEMENT OF THE CASE

Home mortgage lenders across the country pay countless "yield spread premiums" to mortgage brokers every day of the week, allowing consumers to lower or even eliminate the up-front costs of finding a home mortgage. This case concerns the legality of this commonplace business practice under the Real Estate Settlement Procedures Act of 1974 ("RESPA" or the "Act"), 12 U.S.C. § 2601 *et seq.*

I. THE MORTGAGE BROKERAGE INDUSTRY AND YIELD SPREAD PREMIUMS

Historically, home buyers obtained mortgage loans directly from mortgage lenders, such as local banks or savings and loan associations. These lenders originated mortgage loans through their own retail offices and with their own funds, and then held the loans for their entire term. *See* Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers; Final Rule ("1999 Policy Statement"), 64 Fed. Reg. 10,080, 10,080 (Mar. 1, 1999) (Pet. App. 77a). Starting in the 1980s, independent "mortgage brokers" began offering mortgage loans on a retail basis that were funded and acquired by wholesale lenders (a practice known as "table funding"). *Id.* Today, mortgage brokers originate half of all mortgage loans made in the United States. *Id.* (Pet. App. 78a). Petitioner Irwin, one of the nation's top mortgage lenders, offers home mortgage loans both on a retail basis and on a wholesale basis through a national network of thousands of non-exclusive mortgage brokers.

In addition to providing facilities and goods, such as office space, equipment, staff and the documentation that comprises a mortgage loan, mortgage brokers like those in Irwin's network provide a myriad of services that are necessary to create a loan package for a mortgage lender to fund and acquire. *Id.* at 10,081, 10,085 (Pet. App. 78a-79a, 94a-95a). These services include, among other things, taking information from borrowers and completing applications; analyzing prospective borrowers' income and debt and pre-qualifying borrowers to determine the maximum loan amount they can afford; counseling borrowers about loan products, the lending process, and credit-qualification underwriting issues; collecting and verifying financial information; providing disclosures; obtaining credit reports; ordering legal documents; initiating property inspections and appraisals; preparing loan documents; and participating in closings. *Id.* at 10,085 (Pet. App. 94a-95a). "The level of services mortgage brokers provide in particular transactions depends on the level of difficulty involved in qualifying applicants" as well as with the "different servicing or processing arrangements with wholesale lenders." *Id.* at 10,081. (Pet. App. 78a-79a).

A mortgage broker's compensation for originating and processing a loan may be paid directly by the borrower in up-front fees, indirectly through the acceptance of a higher interest rate in exchange for lender payments to the broker, or by a combination of both. *Id.* at 10,081 (Pet. App. 79a). Lender payments to mortgage brokers thus allow consumers in many instances to obtain loans without paying any direct fees themselves. *Id.* (Pet. App. 80a). Among the most common lender payments relied upon by home buyers to reduce out-of-pocket settlement costs are yield spread premiums, which are payments from lenders calculated in part based on the interest rate of the loan. On a daily basis, lenders send brokers rate sheets listing a range of wholesale loan prices, expressed in relationship to a bench-mark "par"

interest rate. *Id.* For loans below the par rate, lenders charge discount points, while for loans above the par rate, lenders pay yield spread premiums. Thus, depending upon their objectives, position, and cash on hand, borrowers may choose from a spectrum of interest-rate and up-front-cost combinations.

II. STATUTORY AND REGULATORY FRAMEWORK

In 1974, before the rise of the mortgage brokerage industry, Congress enacted RESPA to protect home buyers from "unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). Among other such practices, RESPA, in Section 8(a), prohibits giving or receiving "any fee, kickback, or thing of value pursuant to any agreement or understanding ... that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." *Id.* § 2607(a).[1] This general prohibition against referral fees and kickbacks is modified, however, by Section 8(c) of the Act, which provides that "[n]othing in this section [8] shall be construed as prohibiting ... payment for goods or facilities actually furnished or for services actually performed." *Id.* § 2607(c)(2).

Congress has expressly delegated to the U.S. Department of Housing and Urban Development ("HUD") authority to implement RESPA. *See* 12 U.S.C. § 2617(a) ("The Secretary [of Housing and Urban Development] is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable

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[1] Real estate "settlement services" include "the origination of a federally related mortgage loan," 12 U.S.C. § 2602(3), and a "federally related" mortgage loan is generally one made by a lender insured or regulated by the federal government, made or assisted by the federal government, to be sold to Fannie Mae, Freddie Mac, or Ginnie Mae, or is made by certain real-estate investors, *id.* § 2602(1)(B).

exemptions for classes of transactions, as may be necessary to achieve the purposes of this Act."). HUD has provided that such "a rule, regulation or interpretation" includes, among other things, any "document that is published in the FEDERAL REGISTER by the Secretary and states that it is an 'interpretation,' 'interpretative rule,' 'commentary,' or a 'statement of policy' for purposes of [§ 2617(a)]." 24 C.F.R. § 3500.4(a)(1)(ii).[2]

HUD has exercised its delegated authority to issue basic regulations implementing RESPA, *see* 24 C.F.R. § 3500 *et seq.*, commonly referred to as "Regulation X," *id.* § 3500.1. Regulation X specifies that while "Section 8 of RESPA permits ... payment for goods or facilities actually furnished or for services actually performed," *id.* § 3500.14(g)(1)(iv), "[i]f the payment ... bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided," *id.* § 3500.14(g)(2).

Acting again pursuant to its congressionally delegated authority to implement RESPA, and in response to congressional concerns, HUD issued a statement of policy in 1999 that set forth a two-part test for determining the legality of payments, including yield spread premiums, to mortgage brokers under the anti-kickback provisions of Section 8 and Regulation X.[3] Under the HUD test, the

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[2] The delineation of which HUD pronouncements are binding is significant to the enforcement of RESPA because the Act provides a safe harbor for "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation" by HUD. 12 U.S.C. § 2617(b).

[3] In reaction to a mounting litigation crisis surrounding yield spread premiums, *see infra* at 22-23, the House Conference Report on the Veterans Affairs and HUD Appropriations Act, 1999 ("1998 Conference Report") emphasized that "Congress never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or for services actually performed to be violations" of Section 8 of RESPA. *See* H.R. Conf. Rep. No. 105-769, at 260 (1998). The 1998 Conference Report directed HUD "to clarify its position" on the legality of lender payments to

threshold question is "whether there were goods or facilities actually furnished or services actually performed for the total compensation paid to the mortgage broker." 64 Fed. Reg. at 10,085 (Pet. App. 94a). To facilitate the determination of whether sufficient services were performed by brokers to satisfy this initial prerequisite for legality under Section 8, HUD identifies a typical set of such services and sets out minimal requirements for the number and types of such services that must be performed. *See id.* (Pet. App. 94a-96a).[4]

If the first step is met, the second—and "determinative"—question under the HUD test is whether the total compensation paid to the broker "is reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed." *Id.* at 10,085-86 (Pet. App. 97a-98a). Under this latter step, "total compensation" encompasses both direct fees (from the borrower) and indirect fees (from the lender), including payments that are based on the "interest rate" of a loan, like yield spread premiums. *Id.* at 10,084, 10,086 (Pet. App. 93a, 100a). As explained below, HUD reaffirmed this test in the Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b); Final Rule,

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brokers under RESPA and to provide "guidance" to "the courts" to reduce the "legal uncertainty" surrounding the practice. *Id.* HUD responded to this directive with the 1999 Policy Statement. 64 Fed. Reg. at 10,080 (Pet. App. 75a).

[4] HUD also identifies the "goods and facilities, such as reports, equipment, and office space," that brokers may provide. 64 Fed. Reg. at 10,081 (Pet. App. 78a); *id.* at 10,085 (Pet. App. 97a) (noting that "goods" include "appraisals, credit reports, and other documents required for a complete loan file" and that "facilities" include "retail or 'store-front' operation").

66 Fed. Reg. 53,052 (Oct. 18, 2001) (Pet. App. 107a-139a) ("2001 Policy Statement").[5]

III. HISTORY OF THIS LITIGATION

In December of 1995, Respondents John and Patricia Culpepper used a mortgage broker, Premiere Mortgage Company, to obtain an FHA home mortgage loan from Irwin (then Inland Mortgage Corporation) in the amount of $77,761 at an interest rate of 7.5%. N.D. Ala. Record, 2SR6-81P-Ex. 1-Ex. X.[6] The Culpeppers paid a $760.50 origination fee to the broker and the broker received the rest of its compensation through a $1,263.61 yield spread premium from Irwin.[7] N.D. Ala. Record, 2SR6-81S-Ex. F, 2SR1-54A-19.

In August of 1997, Respondent Beatrice Hiers, whose loan was unusually complicated due to an earlier Chapter 13 bankruptcy petition she had filed, N.D. Ala. Record, 2SR4-62F-2, obtained an FHA adjustable rate home mortgage loan in the amount of $157,874 from Irwin through a mortgage broker, Homebuyers Mortgage Incorporated. N.D. Ala.

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[5] HUD ensures that consumers are informed of any yield spread premium in their settlement. HUD, for example, requires that yield spread premiums be disclosed to borrowers on a "Good Faith Estimate" at the time of applying for a loan and on a final "HUD-1" settlement statement at or before closing. 24 C.F.R. pt. 3500, App. B, Illus. 13; 64 Fed. Reg. at 10,087 (Pet. App. 103a); *see also* 24 C.F.R. pt. 3500, App. A, Section L (Instructions for Completing HUD-1). In addition, HUD mandates that borrowers receive a settlement costs booklet from HUD explaining the settlement process, 41 Fed. Reg. 23,620 (June 10, 1976), 52 Fed. Reg. 13,566 (Apr. 23, 1987), and describing the sources of broker compensation and their relationship to points and interest rates. 62 Fed. Reg. 31,982 (June 11, 1997).

[6] Citations to the record in the court of appeals are indexed against the record in the district court, as required by Eleventh Circuit Local Rule 28-4.

[7] The origination fee paid to the broker by the Culpeppers would not have covered the broker's overhead for the settlement, let alone provided full compensation for the services rendered. N.D. Ala. Record, 2SR6-81S-Ex. B-39-40.

Record, 2SR1-54A-18, 2SR6-81S-Ex. G. The broker received, among other compensation, $758.64 directly from Hiers, as well as a $4,538.87 yield spread premium from Irwin. In each case, Respondents were able to close on their loans by effectively financing their closing costs over the life of the loan through yield spread premiums, even though they did not have sufficient funds to pay up-front settlement costs (including compensation for the variety of services and goods provided by their brokers). N.D. Ala. Record, 2SR6-81P-Ex. 2-26-27, 2SR4-62F-3-4.

In April 1996 and August 1998, respectively, the Culpeppers and Hiers filed separate class-action lawsuits alleging that Irwin's payment of yield spread premiums violated Section 8 of RESPA.[8] Initially, the district court granted Irwin summary judgment on the Culpeppers' individual claims. Pet. App. 60a. The court of appeals reversed, holding that the yield spread premium was a referral fee under § 2607(a). Pet. App. 43a. The court concluded that the payment did not fall within the "exception[]" listed in § 2607(c)(2) for "payment for goods or facilities actually furnished or for services actually performed." *Id.* This was so, according to the court, because "[n]o evidence suggest[ed] that [the origination fee] was not intended by both [the broker] and the Culpeppers to compensate [the broker] fully for the work it did for the Culpeppers," and because the yield spread premium was based in part on the interest rate and "not tied to the quantity or quality of the [broker's] services." Pet. App. 43a-44a. The court of appeals held, moreover, that the yield spread premium could be found illegal under RESPA without regard to whether the fees received by the broker exceeded the fair market value of the services actually rendered. Pet. App. 45a.

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[8] The jurisdiction of the district court was invoked under 12 U.S.C. § 2607(d)(2), (5) and 28 U.S.C. § 1331.

On remand, the district court consolidated the Culpeppers' and Hiers' actions, and certified a nationwide class under Federal Rule of Civil Procedure 23(b)(3). The class included all persons who obtained an FHA loan funded by Irwin during the period April 11, 1995 to June 22, 1999, where the broker was paid an origination fee of 1% or greater and received a yield spread premium paid by Irwin. Pet. App. 17a, 25a. The district court held that class certification was appropriate because the claims of the putative class turned "largely, almost exclusively, on [one] issue": the evidence that the yield spread premiums Irwin paid were "unconnected to anything but the difference between the par rate and the interest rate at which the mortgage was made." Pet. App. 26a.

The court of appeals granted Irwin's Federal Rule of Civil Procedure 23(f) petition for interlocutory review and affirmed. Pet. App. 3a, 14a-15a.[9] The court of appeals began its analysis with the proposition that the "ultimate issue" of class certification under Rule 23(b)(3)'s requirement that "'questions of law or fact common to the members of the class predominate over any questions affecting only individual members'" required it "to settle on a rule of liability" under Section 8 of RESPA. Pet. App. 6a (quoting

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[9] The court of appeals also granted Rule 23(f) petitions in three similar cases challenging yield spread premium payments under Section 8 of RESPA, *Heimmermann v. First Union Mortgage Corp.*, 188 F.R.D. 403 (N.D. Ala. 1999) (class certification granted), *petition to appeal granted*, No. 99-14066 (11th Cir. Oct. 19, 1999); *McBride v. ReliaStar Mortgage Corp.*, No. 1:98-CV-215-TWT (N.D. Ga. Apr. 29, 1999) (class certification denied), *petition to appeal granted*, No. 99-12110 (11th Cir. July 8, 1999); *Hirsch v. BankAmerica Corp.*, No. 1:98-CV-1031-ODE (N.D. Ga. Apr. 20, 1999) (class certification denied), *petition to appeal granted*, No. 0011837-TT (11th Cir. June 9, 1999). The court of appeals consolidated these cases with the case below for briefing and oral argument, but has only ruled on this case. As discussed below, the court of appeals has issued orders in the three pending cases requesting supplemental briefing on the 2001 Policy Statement. Pet. App. 140a-45a.

Fed. R. Civ. P. 23(b)(3)). The court explained that this was so because "[w]hether transaction-specific evidence is necessary or relevant ... depends on the rule of liability." *Id.* The court of appeals accordingly held that the "crux of [the] appeal," Pet. App. 5a, was the proper interpretation of HUD's two-part test governing proof of Section 8 violations, because the 1999 Policy Statement was "imbue[d] with the force of a regulation" under 24 C.F.R. § 3500.4(a)(1)(ii). *Id.*[10]

The court, however, found the 1999 Policy Statement "ambiguous" with respect to the meaning of the phrase "for compensation paid" in the threshold inquiry in the HUD test concerning "'whether goods or facilities were actually furnished or services were actually performed for the compensation paid.'" Pet. App. 6a, 8a (quoting 64 Fed. Reg. at 10,084). To the court, the phrase could mean, as Respondents argued, that any payment must be "specifically for [the] services" provided by a broker (*i.e.*, a direct link between the specific element of compensation and the services provided). Pet. App. 7a. Alternatively, as Petitioner maintained, the phrase could simply require that a requisite quantity and quality of services actually be performed before turning to an analysis of the relationship between total broker compensation from all sources and the value of the broker's services. Pet. App. 8a-9a. Thus framed, the court "turn[ed] to determining the rule of liability prescribed by the HUD [1999 Policy Statement]." Pet. App. 8a.

The court of appeals "agree[d] with [Respondents'] view of the rule of liability" that the threshold step of the HUD test requires a broker to have performed the services

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[10] Irwin on appeal generally did not challenge the sufficiency of the threshold requirements for class certification under Rule 23(a), with the exception of a challenge to Respondent Hiers' adequacy to act as class representative, an issue the court of appeals found unnecessary to address. Pet. App. 14a n.15.

provided as part of a direct "services-for-money exchange." *Id.* For the court, this interpretation of the HUD test best fit the dictionary definition of the word "for," Pet. App. 9a (quoting *Webster's Third International Dictionary* 886 (unabridged ed. 1981)), avoided any tension between the HUD test and the language of RESPA Section 8(c), Pet. App. 10a, and prevented the HUD test from creating an inconsistency between Sections 8(a) and 8(c) of the Act, *id.* The court also rejected Irwin's alternative argument, arising from the standard set forth on the original appeal of Irwin's summary judgment motion, that class certification is inappropriate because liability under RESPA requires an analysis of the subjective intent of the broker and borrower about the degree to which any yield spread premium constitutes payment for services rendered. Pet. App. 13a-14a.

Accepting Respondents' view that any yield spread premium payment not tied at the outset to a specific service is, by definition under the threshold step of the HUD test, an illegal referral fee, the court concluded that class certification was appropriate. Pet. App. 14a. Class members did not, in the court's view, need to demonstrate the lack of a reasonable relationship between total broker compensation and services in each transaction, but could instead rely on common proof that Irwin had standard agreements with brokers to calculate and pay yield spread premiums with reference to interest rates. Pet. App. 13a-14a. As a result, the court concluded that a yield spread premium could represent an illegal kickback even if the amount of the fee did not exceed the fair market value of the services that were actually performed by the broker.

IV. THE HUD 2001 POLICY STATEMENT

On October 18, 2001, only a little over two months after the court of appeals denied Irwin's petition for rehearing and suggestion of rehearing en banc, and in direct response to

the opinion below, HUD issued the 2001 Policy Statement. Taking the extraordinary step of directly addressing the decision of the court of appeals in this case, HUD indicated that it "disagree[d] with the judicial interpretation regarding Section 8 of RESPA and the 1999 Statement of Policy." 66 Fed. Reg. at 53,054-55 (Pet. App. 119a). Acting again under its congressionally delegated authority to implement RESPA, HUD made clear that contrary to the court of appeals' central thesis, the "amount of the [yield spread premium] is not, under the HUD test, scrutinized separately and apart from total broker compensation." *Id.* at 53,053 (Pet. App. 111a).

The 2001 Policy Statement emphasized that:

> [N]either Section 8(a) of RESPA nor the 1999 Statement of Policy supports the conclusion [of the court of appeals] that a yield spread premium can be presumed to be a referral fee based solely upon the fact that the lender pays the broker a yield spread premium that is based upon a rate sheet, or because the lender does not have specific knowledge of what services the broker has performed.

Id. at 53,055 (Pet. App. 120a). HUD has left no doubt that "[t]he legality of any yield spread premium can only be evaluated in the context of the test HUD established and the *specific factual circumstances* applicable to *each transaction* in which a yield spread premium is used." *Id.* at 53,054 (Pet. App. 117a) (emphasis added).[11]

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[11] Following HUD's promulgation of the 2001 Policy Statement, the district court ordered the parties to file supplemental briefs "analyzing the import" of both the 2001 Policy Statement and an order granting summary judgment for the defendant lender in another case challenging yield spread premiums under Section 8 of RESPA, *Bjustrom v. Trust One Mortgage*, No. C00-1166P (W.D. Wash. Oct. 26, 2001) (relying on the 2001 Policy Statement). Pet. App. 64a.

REASONS FOR GRANTING THE PETITION

In affirming class certification on the theory that yield spread premiums may be found illegal under RESPA based solely on the fact that such payments are calculated based on interest rates, the court of appeals decided an issue of national importance that affects home buyers, mortgage lenders and mortgage brokers throughout the country. In contravention of long-standing HUD policy, the court below effectively found that yield spread premiums were *per se* illegal, a holding that threatened to eliminate the practice entirely. Recognizing the immediate and widespread impact of this decision, HUD stepped in rapidly to "eliminate any ambiguity" that the court of appeals had created in fundamentally misinterpreting HUD's 1999 Policy Statement, and to reiterate the benefits to consumers that yield spread premiums provide. 66 Fed. Reg. at 53,052 (Pet. App. 107a-08a). The decision of the court of appeals, however, still stands.

Given the clarity of HUD's rejection of the decision below and the Eleventh Circuit's recognition that the HUD test controls the inquiry on class certification, Irwin respectfully requests that the Court grant this petition, vacate the judgment below, and remand for reconsideration in light of HUD's intervening 2001 Policy Statement. *See Lawrence v. Chater*, 516 U.S. 163, 166-67, 172 (1996) (per curiam) (GVR in light of a new interpretation of a federal statute by the agency charged with its implementation); *Schmidt v. Espy*, 513 U.S. 801, 801 (1994) (GVR in light of an administrative reinterpretation of a federal statute). In analogous circumstances, the Eleventh Circuit has "welcome[d]" the "opportunity [provided by a GVR] to revisit" a decision in light of intervening developments. *Richardson v. Reno*, 175 F.3d 898, 899 (11th Cir. 1999). That opportunity should be afforded here as well. Alternatively, if the Court determines that a GVR does not represent the most appropriate resolution of this petition, this case

warrants plenary review to resolve conclusively the test for liability under RESPA for the payment of yield spread premiums, and the impropriety of granting class certification under the correct liability standard. These are issues of national importance that have divided the lower courts.

I. THE ELEVENTH CIRCUIT SHOULD BE GIVEN THE OPPORTUNITY TO RECONSIDER ITS DECISION IN LIGHT OF HUD'S INTERVENING CLARIFICATION OF THE CONTROLLING TEST FOR LIABILITY UNDER SECTION 8 OF RESPA

A. HUD's Explicit Disavowal of the Court of Appeals' Interpretation of HUD's Test Warrants a Remand for Further Consideration

Noting that "the GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal," 516 U.S. at 168, the Court in *Lawrence* set forth the basic standard for the grant of a GVR order. There, the Court stated that where "intervening developments" reveal a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation," *id.* at 167, a GVR order may be appropriate. Whether the Court grants the order ultimately turns on the equities of the case, such as whether the intervening development is part of an unfair or manipulative litigation strategy or whether the delay and cost of a remand outweigh the potential benefits of further consideration below. *Id.* at 167-68.

This petition meets the *Lawrence* standard in all respects. To begin with, the 2001 Policy Statement, which is entitled to no less deference than the court of appeals paid to the 1999 Policy Statement on which it based its decision, is

an intervening development that clearly reveals at least a "reasonable probability," if not a certainty, that the decision below rests on a premise that can no longer be sustained. Taking issue with the court of appeals' conclusion that liability under the 1999 Policy Statement "could be established under the first part of the HUD test alone," 66 Fed. Reg. at 53,054 (Pet. App. 119a), HUD has now made clear that "the 1999 Statement of Policy requires application of both parts of the HUD test before a determination can be made regarding the legality of a [yield spread premium]." *Id.* at 53,055 (Pet. App. 119a). And, directly contrary to the central proposition underlying the decision below—that the first step of the HUD test requires a specific linkage between any yield spread premium paid and a specific service performed—the 2001 Policy Statement is unambiguous that "[w]here a lender payment to a mortgage broker comprises a portion of total broker compensation, the amount of the payment is not, under the HUD test, scrutinized separately and apart from total broker compensation." *Id.* at 53,053 (Pet. App. 111a).

In response to the court of appeals' assertion that yield spread premiums may be considered illegal referral fees based solely upon the general terms and conditions under which a lender makes a payment to a broker, HUD states that:

> [N]either Section 8(a) of RESPA nor the 1999 Statement of Policy supports the conclusion that a yield spread premium can be presumed to be a referral fee based solely upon the fact that the lender pays the broker a yield spread premium that is based upon a rate sheet, or because the lender does not have specific knowledge of what services the broker has performed.

Id. at 53,055 (Pet. App. 120a). Thus, "in order to discern whether a yield spread premium was *for* goods, facilities or

services under the first part of the HUD test, it is necessary to look at each transaction individually, including examining all of the goods or facilities provided or services performed by the broker in the transaction, whether the goods, facilities or services are paid for by the borrower, the lender, or partly by both." *Id.* (Pet. App. 119a-20a) (emphasis added). In short, "[w]hether or not a yield spread premium is legal or illegal cannot be determined by the use of a rate sheet, but by how HUD's test applies to the transaction involved." *Id.* at 53,055 (Pet. App. 120a).

Although the court of appeals did not reach the second step of the HUD test, HUD clarified in the 2001 Policy Statement that it is necessary at that step to look at each transaction to determine whether the broker's "total compensation" (from the borrower and from the lender) is "reasonably related to the total set of goods or facilities actually furnished or services performed" by comparing the total compensation received by other brokers in similar loan transactions in similar markets. *Id.* (Pet. App. 121a-23a). Just as with the first step, the second step of the HUD test requires a case-by-case examination of the facts and circumstances of each transaction.

HUD has left no doubt that "[t]he legality of any yield spread premium can only be evaluated in the context of the test HUD established and the *specific factual circumstances* applicable to *each transaction* in which a yield spread premium is used." *Id.* at 53,054 (Pet. App. 117a) (emphasis added). HUD's view, moreover, comports entirely with RESPA's mandate that brokers and other providers of settlement services are entitled to "payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c)(2). The holding of the court of appeals, by contrast, would limit broker compensation to up-front fees paid by borrowers, which, as the terms of the Culpeppers' settlement demonstrate, may not even allow the

broker to break even. *See supra* at 7 n.7. The 2001 Policy Statement thus not only raises a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," *Lawrence*, 516 U.S. at 167, but also demonstrates that the court below erred fundamentally in its interpretation of the HUD test, and, as consequence, in affirming the grant of class certification.[12]

Next, remand to the court of appeals at this stage is warranted under *Lawrence* because a redetermination of the "rule of liability" would likely determine the ultimate outcome of the litigation, as well as require decertification of the class. First, the court below repeatedly confirmed that the propriety of certification turned on establishing the "rule of liability" under HUD's interpretation of RESPA.[13] Pet. App. 6a, 8a. Indeed, Respondents moved for summary judgment in the district court based on the rule of liability established by the court of appeals in this decision, and the district court has acknowledged that "the 2001 Policy

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[12] The 2001 Policy Statement also reiterates HUD's long-standing and oft-repeated conclusion that yield spread premiums are not *per se* illegal, as the court of appeals effectively held. 66 Fed. Reg. at 53,054 (Pet. App. 117a). HUD traced its recognition of the validity and utility of yield spread premiums to a 1989 final rule concerning "Deregulation of Mortgagor Income Requirements," *id.* (Pet. App. 116a) (citing 54 Fed. Reg. 38,646 (Sept. 20, 1989) (justifying the retention of limits on loan origination fees by noting that shortfalls in the cost of loan origination services may be recovered by charging higher interest rates)) and to Regulation X, *id.* (citing Illustrations of Requirements of RESPA, Fact Situations 5 and 13 in Appendix B to 24 C.F.R. pt. 3500 and Instructions to Appendix A to 24 C.F.R. pt. 3500 for Completing HUD-1 and HUD 1A Settlement Statements).

[13] Although the court of appeals somewhat parenthetically stated that the question "whether Irwin's yield spread premiums are, or could be, § 8 kickbacks is not relevant to this appeal, which is about the propriety of class certification," Pet. App. 5a n.9, the court then decided the class certification issue entirely as a function of the appropriate rule of liability under HUD's test. *See* Pet. App. 14a.

Statement clearly indicates that it would abrogate the Eleventh Circuit's holdings in [the case below] with regard to both the substantive rules of liability under RESPA § 8 and the propriety of class certification of such claims generally." Pet. App. 64a. It is not clear, however, whether the district court will conclude that it has the latitude to contravene the court of appeals' decision based on the 2001 Policy Statement, or will consider itself bound by the opinion below until the court of appeals itself has had the opportunity to revisit its holding.[14]

The 2001 Policy Statement's definitive refutation of the court of appeals' interpretation of the HUD test for liability under Section 8 of RESPA also warrants decertification of the class. Class certification is not an ancillary issue. It instead represents the type of central issue that warrants reconsideration when intervening legal developments call a court of appeals' decision into question. Indeed, this Court has issued GVR orders in the context of class certification in the past. *See, e.g., Flanagan v. Ahearn*, 521 U.S. 1114, 1114 (1997) (GVR in light of *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)); *Eckerd Drugs, Inc. v. Brown*, 457 U.S. 1128, 1128 (1982) (GVR in light of *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982)).

Courts of appeals have recognized that class certification decisions can have a dramatic impact on the outcome of litigation in situations where—as here—defendants are confronted with the specter of potentially crippling liability. *See, e.g., Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (class certification that turns a "$200,000 dispute" into a "$200 million dispute," "puts a bet-your-company decision to [defendant]'s managers and may induce

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[14] In its order directing the parties to brief the import of the 2001 Policy Statement, the district court urged the parties to focus on "the potential applicability of the law-of-the-case doctrine and whether the 2001 Policy Statement is due deference under [*Chevron*]." Pet. App. 64a.

a substantial settlement even if the [plaintiff]s' position is weak."), *cert. denied*, 70 U.S.L.W. 3267 (2001).[15] Class certification is thus at the core of the issues that will determine the outcome of this case.

Finally, under *Lawrence*, the balance of the equities clearly militates in favor of a GVR in this case. If the court of appeals' test were to stand, HUD's 2001 Policy Statement would have provided the "clarification and certainty" HUD intended to all "lenders, brokers and consumers," 66 Fed. Reg. at 53,053 (Pet. App. 112a), except the very lender whose actions gave rise to the need for the HUD statement. HUD has repeatedly emphasized that yield spread premiums, which the court of appeals all but declared *per se* illegal, provide important benefits to consumers. "One of the primary barriers to homeownership and homeowners' ability to refinance and lower their housing costs," according to HUD, "is the up front cash needed to obtain a mortgage." *Id.* (Pet. App. 115a). Yield spread premiums, however, "can be a useful means to pay some or all of a borrower's settlement costs," thus "foster[ing] homeownership." *Id.* at 53,054 (Pet. App. 116a). Until the HUD 2001 Policy Statement is recognized in the Eleventh Circuit, however,

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[15] The fact that the certification of a plaintiff class in certain circumstances can put tremendous pressure on defendants is reflected in the standards that courts of appeals have adopted in guiding the grant of interlocutory appeal of class certification under Rule 23(f). *See, e.g., Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (noting that an appeal under Rule 23(f) may be warranted because the "grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight") (citing *In Re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995)); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000) (Rule 23(f) appeal may be appropriate because grant of class status can "raise[] the cost and stakes of the litigation so substantially that a rational defendant would feel irresistible pressure to settle"); *see also* Fed. R. Civ. P. 23(f) advisory committee's notes ("An order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

the validity of the practice of paying yield spread premiums remains in doubt.

Interests of efficiency are also fostered by a remand. The court of appeals will necessarily have to address the impact of the 2001 Policy Statement on its prior interpretation in this case as well as many others that remain pending. Over forty Section 8 yield spread premium class action cases are currently being litigated before various district courts in the Eleventh Circuit or are pending before the Eleventh Circuit on appeal. Indeed, signaling its clear interest in considering the impact of the 2001 Policy Statement, the Eleventh Circuit has ordered briefing in the three Section 8 yield spread premium cases it is still considering. *See supra* at 9 n.9. It would be far less costly and entail far less delay for this Court to take the "cautious and deferential" step of granting a GVR order.[16]

B. There is a Compelling Basis for the Court of Appeals to Conclude on Remand that HUD's Intervening Policy Statement is Binding

Although Respondents will likely contend that HUD's 2001 Policy Statement is not binding, any such assertion should not forestall a remand. This Court need not determine the precise level of deference the 2001 Policy Statement is due in order to grant a GVR, because "if an agency interpretation is reasonably probably entitled to

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[16] Beyond the merits of this petition, moreover, giving the court below the opportunity to reconsider its decision in light of HUD's intervening clarification has the potential to forestall a conflict among the circuit courts, as the issues decided by the Eleventh Circuit prior to the 2001 Policy Statement are pending before both the Eighth Circuit, *see Glover v. Standard Fed. & Heartland*, No. 00-8018, and the Ninth Circuit, *see Schuetz v. Banc One Mortgage Corp.*, No. 01-16206, and are being litigated in district courts in almost every other circuit. The longer the Eleventh Circuit's pre-2001 Policy Statement decision erroneously interpreting the HUD test remains, the greater the likelihood becomes that other courts of appeals will decide this issue in line with the 2001 Policy Statement and create a split.

deference and potentially determinative, [the Court] may GVR in light of it." *Lawrence*, 516 U.S. at 172. There can be little doubt, moreover, that the 2001 Policy Statement is entitled to binding deference under *Chevron U. S. A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), and not simply *Skidmore* deference under the analysis set forth in *United States v. Mead Corp.*, – U.S. –, 121 S. Ct. 2164, 2172 (2001).

The court of appeals determined that RESPA was ambiguous as to whether yield spread premiums are illegal under Section 8 and Congress expressly delegated to HUD specific authority to resolve any such ambiguity. *See* 12 U.S.C. § 2617(a).[17] Indeed, that is precisely why the court of appeals relied on the HUD test below. And the 2001 Policy Statement now represents HUD's binding and definitive clarification of that test. HUD expressly invoked its authority to issue binding interpretations of RESPA under § 2617(a) by issuing a "statement of policy" published in the Federal Register, as authorized by 24 C.F.R. § 3500.4(a)(1)(ii). In promulgating the 2001 Policy Statement, HUD was careful to invoke the formality required by § 3500.4(a)(1)(ii). *See* 66 Fed. Reg. at 53,052 (Pet. App. 109a) (stating that HUD was "issuing [the] Statement of Policy in accordance with 5 U.S.C. 552 as a formal pronouncement of its interpretation of relevant statutory and regulatory provisions"). Finally, the 2001 Policy Statement is not only rational, but eminently reasonable. It protects consumers from "unnecessarily high" settlement costs, 12 U.S.C. § 2601(a), by preventing naked

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[17] To the degree, of course, that the 2001 Policy Statement is simply a clarification of HUD's own earlier 1999 Policy Statement, which the court of appeals held to be "ambiguous," Pet. App. 6a, and the underlying regulatory provisions the earlier policy statement elucidated, it would be entitled to binding deference on that ground alone. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulation is "controlling" unless plainly erroneous or inconsistent with the regulation).

referrals and kickbacks (*i.e.*, fees to parties who do "nothing," *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985), other than steer business to lenders), while at the same time preserving the significant benefits to consumers that HUD has recognized yield spread premiums provide.[18]

II. IN THE ALTERNATIVE, THIS CASE IS APPROPRIATE FOR PLENARY REVIEW TO CORRECT THE ELEVENTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE APPLICABLE TEST FOR LIABILITY UNDER SECTION 8 OF RESPA

If, for any reason, the Court determines that a GVR order does not represent the most appropriate resolution of this petition, it should grant plenary review. The decision below resolves an issue of exceptional importance that has divided lower courts and warrants the Court's attention at this time.

Over the past decade, plaintiffs have filed nearly two hundred class actions nationwide challenging yield spread premiums under Section 8 of RESPA. The decision below has only accelerated the pace of litigation, with more than thirty-five additional cases filed since it was handed down and mass solicitation of potential claimants underway for

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[18] Even if not entitled to *Chevron* deference, the 2001 Policy Statement would be entitled to a high level of deference under *Mead*, 121 S. Ct. at 2171-72, 2175-76. HUD has unparalleled expertise with RESPA's complex statutory and regulatory scheme as well as with the home mortgage industry; HUD used a high degree of care in formulating both the test set forth in the 1999 Policy Statement and the clarification of that test in the 2001 Policy Statement and formally published its interpretation in the Federal Register. Finally, HUD's position is entirely consistent with its previous recognition of the validity of yield spread premiums and its recognition that yield spread premiums benefit consumers. *See* 54 Fed. Reg. 38,646 (Sept. 20, 1989); 62 Fed. Reg. 53,912, 53,920-21 (Oct. 16, 1997); 64 Fed. Reg. at 10,081 (Pet. App. 80a). Again, the Court need not resolve this issue in order to issue a GVR order. *Lawrence*, 516 U.S. at 172.

additional cases (a process spurred on by the availability of treble damages and attorney's fees under RESPA). The impact of the decision below on the mortgage banking industry, moreover, cannot be overstated. Millions of Americans obtain more than a trillion dollars in mortgage loans annually, half of which are originated by mortgage brokers, resulting in tens of billions of dollars in lender yield spread premium payments to mortgage brokers each year.[19] The potential class-wide exposure in any given case may range well into the billions of dollars.

The "legal uncertainty" engendered by the litigation crisis surrounding yield spread premiums prompted the House Conference Report on the Veterans Affairs and HUD Appropriations Act, 1999 to direct HUD "to clarify its position" on the issue. *See* H.R. Conf. Rep. No. 105-769, at 260 (1998). HUD responded with the 1999 Policy Statement, attempting to resolve the litigation crisis and bring certainty to consumers, lenders and brokers. The opinion of the court of appeals in this case amply illustrates, however, that the 1999 Policy Statement did not have its intended effect. HUD was required to intervene yet again by issuing its 2001 Policy Statement. Even though the 2001 Policy Statement leaves no ambiguity about the proper test for determining the legality of yield spread premiums, plaintiffs' class action counsel across the country have already begun to challenge that interpretation. A definitive ruling from this Court would represent the only way to end this decade-long battle to destroy a vital segment of the home-mortgage industry.

Finally, while the opinion below does not conflict with any other court of appeals decision, it is in conflict with a multitude of district court decisions. In all, forty-eight district court decisions (thirty-four outside the Eleventh

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19 In one recent year alone, yield spread premiums were paid in connection with over $700 billion in loan originations. *See* Lew Sichelman, *YSPs 'Crucial' for the Industry*, National Mortgage News, Apr. 28, 1997, at 25 (discussing 1996 data).

Circuit) have interpreted RESPA Section 8 to preclude class certification in analogous yield spread premium cases, and in nine cases, district courts have interpreted Section 8 to allow for class treatment (six of which were in the Northern District of Alabama, including the decision affirmed below). While Petitioner submits that a GVR order is appropriate, plenary review by this Court would forestall a growing conflict of authority and bring needed and definitive resolution to the litigation crisis currently facing the home-mortgage industry.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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